YB Dato' Hj Muhammad bin Hj Abdul Ghani v The New Straits Times Press (M) Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–23–123 OF 2006
ASMABI MOHAMAD JC
9 JULY 2011

Civil Procedure — Discretionary power — Preliminary issues — Newspaper articles — NST's article 'Senator in cloned AP scam' — Berita Harian article 'Syarikat Milik Senator klon AP' — Whether referred to or capable of referring to plaintiff — Whether defamatory of plaintiff — Whether action could be disposed of without need of extrinsic evidence — Whether fit and appropriate case to exercise discretionary powers — Rules of the High Court 1980 — O 33 rr 2 & 5

Tort — Defamation — Libel — Newspaper articles — NST's article 'Senator in cloned AP scam' — Berita Harian article 'Syarikat Milik Senator klon AP' — Articles made general statements with no specific reference to plaintiff by his name — Whether referred to or capable of referring to plaintiff — Whether defamatory — Judicial notice that plaintiff not the only Senator appointed to Dewan Negara

The plaintiff's case was founded on libel. The plaintiff, a senator, relied on the *News Straits Times* ('NST') article entitled 'Senator in cloned AP scam' and the *Berita Harian* ('BH') article entitled *'Syarikat Milik Senator klon AP'* ('articles complained of') to premise his claim against the defendants. The plaintiff alleged that the articles complained of were defamatory of the plaintiff and had tarnished his character, credibility, reputation and also the offices held by him thereby bringing about hatred and public scandal. The plaintiff therefore claimed against the defendants, inter alia, general damages, aggravated and/or exemplary damages for libel, an injunction to restrain the defendant and its agent from further publishing similar defamatory words of him. At the outset of the trial, the defendants had urged this court to determine the following preliminary issues: (i) whether the articles complained of, when read in its entirety and in its proper context referred to or was capable of referring to the plaintiff; and (ii) whether the articles complained of were defamatory of the plaintiff.

Held, allowing the defendant's prayers with costs:

(1) On reading the articles complained of in its entirety and proper context, either in law or in fact, they did not refer to the plaintiff. The articles complained of merely made very general statements with no specific

reference to the plaintiff by his name. An objective reading of the articles complained of would not have identified the plaintiff as the Senator mentioned therein. The court would have to take judicial notice of the fact that the plaintiff was not the only Senator appointed to the Dewan Negara Malaysia. There were in fact a total of about 70 persons appointed as Senators and were members to the aforesaid Dewan Negara. The articles therefore could not have implicated the plaintiff alone. Even if the said articles were to be read by reasonable persons who are acquainted with the plaintiff, those persons too would not be in a position to conclude that these articles relate to the plaintiff and/or refer to the plaintiff as claimed by the plaintiff (see para 18).

(2) The said articles neither made any mention of the plaintiff nor made any inferences that could be understood whether from the ordinary and plain meaning of the said articles or by way of legal innuendo that the contents of the same bore the meaning in the manner illustrated in para 8 of the statement of claim. In this action, there was nothing in the articles complained of which casts a defamatory imputation against the plaintiff specifically. As the said articles did not refer to the plaintiff, it was incapable of being defamatory of the plaintiff (see para 28).

[Bahasa Malaysia summary

Kes plaintif adalah berasaskan pada libel. Plaintif, seorang senator, bersandarkan kepada artikel *News Straits Times* ('NST') bertajuk *Senator in cloned AP scam* dan *Berita Harian* ('BH') artikel bertajuk 'Syarikat Milik Senator klon AP' ('artikel yang diadukan') untuk mempremiskan tuntutan terhadap defendan. Plaintif mendakwa artikel yang diadukan memfitnah plaintif dan telah mencemarkan watak, kredibiliti, reputasinya dan juga pejabat-pejabat yang dipegang olehnya dan dengan itu membawa kepada kebencian dan skandal awam. Oleh itu, plaintif mendakwa terhadap defendan, antara lain, ganti rugi am, ganti dan/atau ganti rugi teladan untuk fitnah, injunksi untuk menghalang defendan dan ejennya dari selanjutnya menerbitkan perkataan fitnah yang sama terhadapnya. Di permulaan perbicaraan tersebut, defendan telah menggesa mahkamah untuk menentukan isu-isu awal yang berikut: (i) sama ada artikel yang diadukan tersebut, apabila dibaca secara keseluruhan dan dalam konteks yang betul merujuk kepada atau boleh merujuk kepada plaintif; dan (ii) sama ada artikel yang diadukan memfitnah plaintif.

Diputuskan, membenarkan permohonan defendan dengan kos:

(1) Apabila membaca artikel yang diadukan secara keseluruhannya dan konteks yang betul, sama ada dalam undang-undang atau fakta, ia tidak merujuk kepada plaintif. Artikel-artikel yang diadukan hanyalah kenyataan yang sangat umum dan tidak merujuk secara khusus kepada plaintif dengan namanya. Bacaan objektif artikel yang diadukan tidak

dapat mengenal pasti plaintif sebagai Senator yang disebut di dalamnya. Mahkamah ini perlu mengambil pengiktirafan kehakiman mengenai fakta bahawa plaintif bukanlah satu-satunya senator yang dilantik ke Dewan Negara Malaysia. Malah terdapat sejumlah kira-kira 70 orang yang dilantik sebagai Ahli Dewan Negara dan sebagai ahli dalam Dewan Negara tersebut. Oleh itu, perkara-perkara tersebut tidak boleh dikaitkan dengan plaintif sahaja. Walaupun artikel tersebut untuk dibaca oleh orang-orang yang munasabah yang mengetahui mengenai plaintif, orang-orang tersebut juga tidak akan berada dalam kedudukan yang akan menyimpulkan bahawa artikel-artikel adalah berkaitan dengan plaintif dan/atau merujuk kepada plaintif seperti yang dituntut oleh plaintif (lihat perenggan 18).

(2) Artikel tersebut tidak menyebut apa-apa plaintif dan tidak membuat sebarang inferens yang boleh difahami sama ada dari segi pengertian biasa dan fail yang mengandungi artikel-artikel tersebut atau sama ada secara kiasan undang-undang bahawa kandungan yang sama mempunyai makna dengan cara yang ditunjukkan dalam perenggan 8 penyataan tuntutan tersebut. Dalam tindakan ini, tiada apa-apa jua dalam perkara yang diadukan yang memfitnah plaintif yang khusus. Memandangkan artikel tersebut tidak merujuk kepada plaintif, ia tidak berupaya untuk memfitnah plaintif (lihat perenggan 28).]

Notes

For cases on libel, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 484–645.

Cases referred to

Ayob bin Saud v TS Sambanthamurthi [1989] MLJ 315; [1989] 1 CLJ 152, HC (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 CLJ 461, CA (refd)

Kian Lup Construction v Hongkong Bank Malaysia Bhd [2002] 7 MLJ 283, HC (refd)

Knupffer v London Express Newspapers Ltd [1944] AC 116, HL (refd)

Morgan v Odhams Press Ltd [1971] 1 WLR 1239, HL (refd)

Soh Chun Seng v CTOS-EMR Sdn Bhd [2003] 4 MLJ 80; [2004] 5 CLJ 46, HC (refd)

Syed Hussin Ali v Syarikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)

Legislation referred to

Rules of the High Court 1980 O 33 rr 2, 5

Hamzah Daud Daros (Hamzah Daud Daros & Siti Nor) for the plaintiff.
Kavita Karuppanan (Shearn Delamore & Co) for the defendants.

Asmabi Mohamad JC:

INTRODUCTION

[1] This action was fixed for a full trial before me on 13 April 2011. At the outset of the trial learned counsel of the defendants has urged this court to hear the defendant's/applicant's summons in chambers dated 7 July 2010 ('encl 16') made pursuant to O 33 r 2 of the Rules of the High Court ('RHC') for trial of preliminary issues before the court proceed to hear the case on its merits. According to learned counsel, the outcome of the hearing of encl 16 would determine whether there ought to be a trial of the action or a dismissal of the plaintiff's suit outright without having to go through a full-blown trial.

[2] I acceded to the defendant's request, heard submissions by both learned counsel for the plaintiff as well as for the defendants and on the same day I granted the prayers sought by the defendants in encl 16 with costs in the sum of RM15,000 to be paid by the plaintiff to the defendant. The plaintiff/respondent being dissatisfied with the said decision now appeals to the Court of Appeal Malaysia against the whole of the said decision.

THE APPLICATION

[3] For the purpose of the hearing of encl 16 the following affidavit was filed herein and considered by this court:

(a) affidavit in support of encl 16 by Keshminder Singh a/l Harbajan Singh affirmed on 7 July 2010 ('encl 15').

[4] The plaintiff/respondent did not file any affidavit in reply as the plaintiff was out of time to do so. However an attempt was made by the plaintiff/respondent to apply for leave for extension of time to file the affidavit in reply vide summons in chambers dated 28 September 2010 ('encl 18') which was granted by the court on 9 December 2010. Despite leave having been granted, up to the hearing of encl 16 no affidavit in reply was filed by the plaintiff for this court's consideration.

[5] It is the defendant's case that a determination of the preliminary issues as set out in para 6 below would dispose off the plaintiff's action against the defendants altogether without having to go through a trial. It would also save time and costs of all parties concerned.

THE PRELIMINARY ISSUES

[6] For ease of reference the translated version of the preliminary issues framed for this court's determination as stated in encl 16 are reproduced below:

(a) whether NST's article entitled 'Senator in cloned AP scam' published in the *News Straits Times* ('NST') on 9 October 2006 ('the NST article') when read in its entirety and in its proper context referred to or was capable of referring to the plaintiff?;

(b) whether the *Berita Harian* ('BH') article entitled 'Syarikat Milik Senator klon AP' with the sub-heading 'Kastam ada bukti kukuh untuk dakwa 'Datuk' kes palsu permit kereta' published in *Berita Harian* on 9 October 2006 (the 'BH article') when read in its entirety and in its proper context referred to or was capable of referring to the plaintiff?; and

(c) whether the NST and BH articles, when read in their entirety and in the proper context, are defamatory of the plaintiff in the manner pleaded by the plaintiff in paras 8 and 8.1–8.4 of the statement of claim dated 7 December 2006 ('SOC')?

BRIEF FACTS

[7] The plaintiff's case is founded on libel. The plaintiff relies on the NST article and the BH article ('articles complained of') respectively to premise his claim against the defendants. The particulars of the articles complained of could be seen at paras 5–6 of the SOC (pp 8–11 of the bundle of pleadings marked as document 'A').

[8] It is the plaintiff's pleaded case ('para 8' of the SOC) that the articles complained of in their ordinary meaning, impute that:

(a) the plaintiff who is a Senator, is a greedy and an irresponsible person and is therefore not fit to hold a public office;

(b) the plaintiff has illegally and unlawfully obtained income in the sum of RM500,000 per month for the past three years or more through this cloning activities;

(c) the plaintiff is running the car selling business illegally and unlawfully;

(d) the plaintiff is dishonest, a cheat and a person who is without integrity and or a criminal; and

(e) the plaintiff has caused problems with the Government and the relevant authorities because of the said business.

[9] The plaintiff further alleged that the articles complained of are defamatory of the plaintiff and had tarnished his character, credibility, reputation and also the offices held by him thereby bringing about hatred and public scandal.

[10] The plaintiff therefore is claiming against the defendants for general damages, aggravated and or exemplary damages for libel, an injunction to restrain the defendant and its agent from further publishing similar defamatory words of him, interest, costs and other relief this court deems fit.

APPLICABLE LAW ON DEFAMATION

[11] The procedure in establishing a claim on libel has been well illustrated in the leading case of *Ayob Saud v TS Sambanthamurthi* [1989] MLJ 315; [1989] 1 CLJ 152; 1 CLJ (Rep) 321) where His Lordship Mohamed Dzaiddin J (as His Lordship then was) said:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show *(1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published.* Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he had made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged: Rajagopal Rajan (please see the highlighted portion for ease of reference).

[12] It could be gleaned from the above cited case and numerous other established cases, in order to succeed in a claim founded on the tort of libel the following three elements must be proven by the plaintiff:

(a) that the articles complained of bear defamatory imputations;

(b) that the articles complained of made reference to the plaintiff; and

(c) that there is publication of the articles complained of to a third party by the defendant.

FINDINGS

[13] At the outset of the hearing of encl 16 learned counsel for the defendants admitted that the publication of the articles complained of is not in issue. Therefore this court would have to focus only on the two remaining issues as illustrated in subpara 12.1–12.2 above. I propose to deal with the second issue first and then to be followed by the first issue.

SECOND ISSUE — WHETHER ARTICLES MADE REFERENCE TO THE PLAINTIFF

[14] It is trite law that an essential element of the cause of action founded on the tort of defamation is that the words complained of should be published of

the plaintiff. In a situation where the plaintiff is not named, the test is whether the words would reasonably lead people acquainted with the plaintiff to conclude that he was the person referred to in the articles complained of (please see *Knupffer v London Express Newspapers Ltd* [1944] AC 116).

[15] David Price and Korieh Duodo, co-authors of the book *Defamation Law, Procedure & Practice* (3rd Ed),states that the test to be applicable is '… whether reasonable readers generally or reasonable reader with the particular knowledge would understand the statement to refer to the claimant. Mere conjecture that it might refer to the claimant is insufficient'.

[16] In *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, Lord Donovan at p 1263 states:

> It is always for the plaintiff to prove that the defamatory words were published of and concerning him. The onus is firmly upon him, and if he does not discharge it, he has no cause of action.

[17] In the case of *Knupffer v London Express Newspapers Ltd* [1944] AC 116 His Lordship Viscount Simon LC emphasised that in handling a cause of action premised on a tort of defamation the following two questions ought to be considered by the court:

(a) firstly, a question of law, that is, could the article complained of having regard to their language, be regarded as capable of referring to the plaintiff?; and

(b) secondly, a question of fact, that is, could the article complained of, in fact, lead reasonable people who are acquainted with the plaintiff to conclude that it does refer to the plaintiff?

[18] With the above principle in mind, I will now proceed to evaluate the articles complained of in order to ascertain if the said articles made reference to the plaintiff. A close scrutiny of the SOC would reveal that the plaintiff has failed to plead any particulars of reference relating the plaintiff to the articles complained of. On reading the articles complained of in entirety and in the proper context, either in law or in fact, I am satisfied that they do not refer to the plaintiff. The whole articles complained of merely made very general statements with no specific reference to the plaintiff by his name. An objective reading of the articles complained of would not identify the plaintiff as the Senator mentioned therein. This court would have to take judicial notice of the fact that the plaintiff is not the only Senator appointed to the Dewan Negara Malaysia. There are in fact a total of about 70 persons appointed as Senators and are members to the aforesaid Dewan Negara. The articles therefore could not have implicated the plaintiff alone. Even if the said articles were to be read

by reasonable persons who are acquainted with the plaintiff, those persons too would not be in a position to conclude that these articles relate to the plaintiff and or refer to the plaintiff as claimed by the plaintiff in his SOC. As such the two questions posed by His Lordship Viscount Simon LC in the case of *Knupffer v London Express Newspapers Ltd* would have to be answered in the negative.

[19] According to *Halsbury's Laws of Malaysia* (Vol 13, 2007 Reissue) 'Words are not actionable as libel or slander unless they are published of and concerning the Plaintiff. Failure to connect the Plaintiff to the words complained of may lead to the claim being dismissed'.

[20] As the plaintiff has failed miserably to connect him to the words complained of, the second element required of him by the law has not been fulfilled. Hence issue (ii) posed for this court's determination must therefore be answered in the negative.

FIRST ISSUE — WHETHER DEFAMATORY OF THE PLAINTIFF

[21] In the case of *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283 the court has stated that whether the words complained of, are defamatory lies on the nature of the statement in that it must have a tendency to affect the reputation of a person.

[22] In the book the *Law of Defamation in Singapore and Malaysia*, (2nd Ed), by Keith R Evans, it is stated that in applying these various tests, the court must look to a particular group that is, in whose eyes must the estimation of the plaintiff be lowered before the words are said to be defamatory. The court went on further to state that in determining the issue the court does not look to the actual effect of the allegations on the person's reputation, or the meaning of the words actually understood or taken by the listeners. It is enough that the listeners actually take the words in a defamatory sense, for they must be reasonably justified in so understanding the words before they are found to be defamatory.

[23] The plaintiff alleged that the articles complained of are defamatory of the plaintiff and had tarnished his character, credibility, reputation and also the offices held by him thereby bringing about hatred and public scandal.

WHETHER THE SAID WORDS HAD DEFAMATORY IMPUTATION AND OR REFLECTED ON THE PLAINTIFF'S REPUTATION

[24] It is now opened to this court to analyse the articles complained of and

A determine if these articles had defamatory imputation and or reflect on the plaintiff's character, credibility, reputation, and the plaintiff's offices as pleaded by the plaintiff in para 8 of his SOC.

WHAT IS DEFAMATORY IMPUTATION?

B

[25] The following are some of cases which have attempted to define defamatory conduct or imputations:

(a) In *Syed Hussin Ali v Syarikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146 for instance, Mohamed Azmi J (as C he then was) said:

> Thus the test of defamatory nature of a statement is its tendency to excite against the plaintiff the *adverse opinion of others*, although no one believes the statement to be true. Another test is: *would the words tend to lower the* D *plaintiff in the estimation of right-thinking members of society generally?* The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

E (b) in the book entitled *Gatley on Libel and Slander* (11th Ed), it was stated that:

> There is no wholly satisfactory definition of defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation 'of any right thinking members of society generally' 'to cut him off from F society' or 'to expose him to hatred, contempt to ridicule' is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.
>
> …
>
> G A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of a right-thinking person generally. To be defamatory an imputation need have no actual effect on a person's reputation; the law looks only on H its tendency.

(c) In *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 CLJ 461 His Lordship Gopal Sri Ram said:

I

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discredible conduct or motives or lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory …

[26] It has to be borne in mind that in arriving at the meaning of the articles complained of, the whole context of these articles would have to be examined in order to ascertain whether the words complained of are defamatory of the plaintiff. In *Soh Chun Seng v CTOS EMR Sdn Bhd* [2003] 4 MLJ 80; [2004] 5 CLJ 46 His Lordship Ramly Ali J (as His Lordship then was) quoted *Gatley* on *Libel and Slander* (9th Ed), as reproduced below:

> In Gatley on *Libel and Slander*, (9th Ed), at p 96 the learned author states: It is necessary to take into consideration, not only the actual words used, but the context of the words.
>
> At p 97, the learned author continues:
>
> > It follows from the fact that the context and circumstances of the publication must be taken into account and that the plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting.
>
> Our courts have also pronounced the same principle to be the law applicable in Malaysia. In *Ratus Mesra Sdn Bhd v Shaikh Osman Majid & Others* [1999] 8 CLJ 499, Kamalanathan Ratnam J at p 504 stated that:
>
> > I agree that the test to be applied when considering a statement is defamatory of a plaintiff is an objective one that it must be given a meaning in which a reasonable man would understand it (see *Gatley on Libel & Slander*, (9th Ed), para 3.12) and that for this purpose, that is, in considering whether the words complained of contained any defamatory imputations, it is necessary to consider the whole article.

[27] As had been illustrated by the above mentioned cases and authorities the test to be applied in this scenario is an objective test and to be decided by a judge having considered the entire articles complained of and the context in which it was made. In order to be defamatory of the plaintiff the articles complained of must contain an imputation which tends to lower the plaintiff in the estimation of right-thinking members of society generally.

[28] On analysing the said articles I am of the view that the said articles do not bear any defamatory imputation to the plaintiff's discredit, 'or which tend to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit. The standard of opinion is that of a right-thinking person generally' as illustrated by the book *Gatley on Libel and Slander* (11th Ed). The said articles neither made any mention of the plaintiff and nor make any inferences that could be understood whether from the ordinary and plain meaning of the said articles or by way of legal innuendo, that the contents of the same bore the meaning in the manner illustrated in para 8 of the SOC. The

said articles are not defamatory of the plaintiff and or referred to the plaintiff as understood by the plaintiff in para 8 of the SOC. In this action, there is nothing in the articles complained of which casts a defamatory imputation against the plaintiff specifically. As the articles did not refer to the plaintiff, it is incapable of being defamatory of the plaintiff.

[29] In view of the above issue (i) too must be answered in the negative.

CONCLUSION

[30] In substance, this court is only required to determine the issues of 'reference' and 'whether the words are 'defamatory'. It is trite that this court has a wide discretionary power to order for preliminary issues to be tried before, at or after the trial of an action. I am of the view that this is a fit and an appropriate case for this court to exercise its discretionary powers to dispose of this action altogether pursuant to O 33 rr 2 and 5 of the RHC just by reading the articles complained of without the need of extrinsic evidence.

[31] Having considered the pleadings, the affidavits filed herein and the arguments by the respective counsel, from each side and having given the matter a very careful and serious consideration, I am of the view the plaintiff's action is obviously unsustainable in law and is doomed to fail. In view of the fact that this court could decide the first and second elements required by the law as had been illustrated in the case of *Ayob bin Saud v TS Sambanthamurthi* [1989] MLJ 315; [1989] 1 CLJ 152 without having to go through the normal process of a full-blown trial and that the final issue pertaining to publication has been admitted by the defendants and resolved herein there is nothing left to be ventilated by this court. Accordingly I allowed the prayers sought by the defendant vide encl 16. I further made an order for costs of RM15,000 for this application to be paid by the plaintiff to the defendants.

Defendant's prayers allowed with costs.

Reported by Ashgar Ali Ali Mohamed